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Environmental Center

A Unit of Water Resources Research Center

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RP:0170

U.S. Army Corps of Engineers
Guam Operations Office (CEPOD-CO-OG)
238 Archbishop F.C. Flores Street, Suite 905
Agana, Guam 96910

To Whom It May Concern:

Application for Department of the Army Permit

PODCO GIN94-001

Discharge of Fill Material in Wetland

Piti and Agat, Guam

The applicant, Mr. Hal Stempel of Island Equipment Company, proposes to discharge fill material into 2.38 acres of a wetlands area totalling 7.06 acres, in Piti and Agat, Guam. This fill area will be part of a proposed 10.92 acre development for proposed gas production facilities, warehouses, utilities and paved areas. The gas production facility is to be relocated out of Tamuning area. The remaining 5.67 acres of wetlands will be enhanced and an additional 1.39 acres of wetlands will be created from existing upland. There have been sightings of the endangered Mariana Common Moorhen and migratory ducks on the site. It has been determined by the U.S. Fish and Wildlife Service that this project will not likely adversely affect the Mariana Common Moorhen or its critical habitat.

This document was reviewed with the assistance of Andrew Quenga, Richardson School of Law, and Malia Akutagawa of the Environmental Center.

Insufficient Information

The information set forth in this PODCO application is sparse; thus, it is difficult to make an accurate assessment of potentially significant environmental impacts. As with other public review processes, clear exposition of the proposed action must be provided in sufficient detail to allow meaningful assessment and critical evaluation. Generally, PODCO notices suffer from a chronic inadequacy in this regard. Our experience with PODCO reviews over

the years has been that unless the project being reviewed has been otherwise documented through either a NEPA or other environmental impact disclosure mechanism, our reviewers cannot discern enough basic information from the PODCO notice to make a useful evaluation. The present notice is no exception to this rule.

Determination Of No Adverse Effect On Endangered Moorhen And Its Critical Habitat

From what little information that is available in the application, it is inconceivable as to how the U.S. Fish and Wildlife Service arrived at its determination that the filling of 2.38 acres of a 7.06 acre wetland and commercial development on the property would not adversely affect the endangered Mariana Common Moorhen and its critical habitat. Section 7 of the Endangered Species Act (ESA), 16 U.S.C. Section 1536 sets forth the criteria that must be met by a federal agency in its determination that the action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ... shall use the best scientific and commercial data available. (ESA Section 7(a)(2)) Was the U.S. Fish and Wildlife's determination founded on solid data? Were surveys and studies conducted on site? Have studies been done on the effects of commercial development on population distributions of the Mariana Common Moorhen?

Taking Of Endangered Moorhen, Alternatives To The Action, And Mitigation Measures

Section 7(b)(4), ESA states:

If after consultation under subsection (a)(2) of this section, the Secretary concludes that -

- (A) *the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;*
- (B) *the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection ...*

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that -

- (i) *specifies the impact of such incidental taking on the species,*
- (ii) *specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact ...*

Section 7(h)(1), ESA allows the granting of exemptions from

subsection (a) (2) if the Endangered Species Committee determines that -

- (A) (i) there are no reasonable and prudent alternatives to the agency action;
 - (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat and such action is in the public interest,
 - (iii) the action is of regional or national significance; and
 - (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and
- (B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

The filling of 2.38 acres of wetlands and constructing gas production facilities on this area constitutes a "taking" in violation of the Endangered Species Act. The case, *Palila v. Hawaii Department of Land and Natural Resources*, 631 F.Supp. 787 (D. Hawaii, 1985), is instructive on this issue. In that case, the definition of a taking was determined by the court's interpretation of harm. Take is defined in 16 U.S.C. Section 1532(19) as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct. It was held that habitat modification may be harmful to a species as a whole, and thus may constitute a taking. The court, in applying its interpretation of the take clause, ordered an evaluation of the critical habitat of the Palila, an endangered Native Hawaiian bird species, and the extent to which mouflon sheep could coexist within that habitat "without [its] significant impairment." In this instance, it is highly probable that the coexistence of a gas facility and the endangered Moorhen, in addition to the partial destruction of the wetland habitat constitutes a taking.

If this taking is deemed to be incidental, then the impact of such incidental taking must be specified and "reasonable and prudent measures" must be considered "to minimize such impact". Were such measures considered before a decision was made to dump fill material in sensitive wetland habitat for the Mariana Common Moorhen? Moreover, before a taking will be considered incidental,

"reasonable and prudent alternatives" to the proposed action must be contemplated. Surely there must have been alternate sites on the island dominated by alien species that could accommodate the proposed commercial facilities. What arguments can be made that the "benefits" of placing commercial gas facilities on the critical habitat of the endangered Moorhen "clearly outweigh alternative courses of action", given that there are probably other less-sensitive sites in which these facilities may be built? Is the project of "regional or national significance" to constitute an exemption from the requirements of Section 7(a)(2), ESA?

As stated previously, an exemption from Section 7(a)(2), ESA requirements under Section 7(h)(1)(B) of the Act calls for "reasonable mitigation and enhancement measures ... and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned." It was stated in the PODCO application that the "remaining 5.67 acres of wetlands will be enhanced and an additional 1.39 acres of wetlands will be created from existing upland" as a mitigation measure. How exactly will the wetlands be "enhanced"? The proximity of the proposed commercial development to the undisturbed wetlands may discourage the endangered Moorhen and migratory ducks from continued residence in this habitat, thus defeating any kind of mitigation measure. As stated above, an assessment must be made as to whether the endangered Moorhen and other biological components of the wetland site can coexist with the proposed the development. Will the noise associated with construction activities and generated from daily commercial interactions once the project is completed adversely affect the wetland habitat? Will the remaining wetland area be subject to discharge of urban pollutants, thus affecting water quality and the viability of the wetland as a continuing ecosystem?

In addition, how will the assumedly dryer upland area be converted into wetland? It is easier to maintain an already existing wetland than to create one. The creation of an artificial wetland will likely incur heavy costs, labor, energy, and resources that far outweigh the building of the proposed commercial facilities at this site.

Environmental Impacts

In addition to impacts to the Endangered Moorhen and its critical habitat, there are also potential adverse effects on the nearshore environment of Agat Bay and surrounding areas adjacent to the project site. A similar project to the proposed action, an old refinery built on a wetland in Guam, was implemented many years ago. The leaking of oil from fuel pipes had gone undiscovered for a long time and destruction of mangrove trees, the habitat and nursery ground for fish, crabs and other invertebrates, resulted. The location of the wetland is somewhat inland, but its relation to the shoreline is almost direct. How can a similar scenario be avoided? What kind of clean up procedures have been considered if

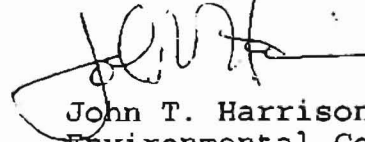
oil is released into the environment again?

Need For An Environmental Impact Statement

If the applicant has not done so yet, he must submit an Environmental Impact Statement (EIS) pursuant to NEPA rules. This action involves the acquisition of federal permits; namely, the referenced Army Corps of Engineers permit, an Incidental Take permit as required under the Endangered Species Act, a possible NPDES permit, etc. The EIS must evaluate the potential impacts to the endangered Mariana Common Moorhen and its critical habitat, as well as nearshore impacts.

Thank you for the opportunity to review this PODCO application.

Sincerely,



John T. Harrison
Environmental Coordinator

cc: OEQC
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